

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

PACIFIC COAST FEDERATION OF
FISHERMEN'S ASSOCIATIONS, *et al.*,

Plaintiff,

V.

WILBUR ROSS, *et al.*,

Defendants.

No. 1:20-CV-00431-DAD-SAB

ORDER GRANTING MOTION FOR
PERMISSIVE INTERVENTION WITH
CONDITIONS ON BRIEFING

(Doc. No. 63)

Plaintiffs, a coalition of six environmental organizations, bring this lawsuit against the National Marine Fisheries Service (NMFS), the U.S. Fish and Wildlife Service (FWS), the U.S. Bureau of Reclamation (Reclamation), and various official representatives of those agencies. (Doc. No. 52.) Plaintiffs' first and second claims for relief challenge the adoption by NMFS and FWS, respectively, of "biological opinions" prepared pursuant to the Endangered Species Act (ESA), 16 U.S.C § 1531 *et seq.*, regarding the impact of the long-term operation of the Central Valley Project (CVP) and the State Water Project (SWP) (collectively, "Water Projects") on various ESA-listed species. More specifically, the first and second claims for relief allege that NMFS and FWS violated the Administrative Procedure Act (APA), 5 U.S.C. § 706, in various ways by concluding that the Water Projects would not jeopardize the continued existence of the

1 ESA-listed species addressed in each biological opinion. Plaintiffs also bring claims against the
2 Reclamation under the ESA (third claim for relief), and the National Environmental Policy Act
3 (NEPA), 42 U.S.C. § 4321 *et seq.* (fourth claim for relief).

4 On March 25, 2020, this case was transferred to this district from the U.S. District Court
5 for the Northern District of California in light of related cases already pending before the
6 undersigned. (Doc. No. 112.) In the interest of expedience, the court adopts the following factual
7 summary recently articulated by the transferor judge:

8 In two biological opinions (one issued in 2008 by the U.S. Fish and
9 Wildlife Service and one issued in 2009 by the National Marine
10 Fisheries Service), the Water Projects were authorized to kill, as
11 incidental to their operations, a limited number of threatened and
12 endangered species of fish. [Doc. No. 52 at 3–4 (¶ 6).] In 2016, after
13 years of drought, the agencies reinitiated consultation under the
14 Endangered Species Act. [*Id.* at 3–4 (¶ 1), 5 (¶ 10).] In January
15 2019, the Bureau of Reclamation issued a biological assessment for
16 a new operating plan for the Water Projects. [*Id.* at 4 (¶ 7).] The
17 plaintiffs claim that the assessment increased the pumping of water
18 from the Sacramento Delta (for export to the Central Valley and
19 Southern California) and weakened or eliminated operational
20 requirements in the 2008 and 2009 opinions that protected listed fish
21 populations. [*Id.*]

22 In July 2019, biologists at the Fisheries Service prepared a biological
23 opinion that concluded that “Reclamation’s proposed plan was likely
24 to jeopardize listed salmon and steelhead . . . and was likely to
25 destroy or adversely modify critical habitat, in violation of the
26 Endangered Species Act.” [*Id.* at 5 (¶ 10).] Then, on October 21,
27 2019, the Fisheries Service issued a biological opinion that
28 concluded — in contrast to the July 2019 opinion — that
Reclamation’s proposed plan was not likely to jeopardize the
existence of winter-run and spring-run salmon and Central Valley
steelhead beyond that permitted under its 2009 opinion. [*Id.* at 5–6
(¶ 12).] Similarly, Fish and Wildlife Service issued an opinion that
Reclamation’s proposed plan was not likely to jeopardize the
continued existence of the Delta Smelt or modify its habitat. [*Id.* at
5 (¶ 11).] On February 18, 2020, Reclamation adopted its proposed
plan and began implementing the altered operations of the Central
Valley Project. [*Id.* at 6 (¶ 14).]

29 (Doc. No. 112 at 2–3.)

30 Plaintiffs initiated this lawsuit on December 2, 2019. (Doc. No. 1.) On January 27, 2020,
31 the transferor court granted permissive intervention to two CVP water contractors: the San Luis
32 & Delta-Mendota Water Authority (Authority) and Westlands Water District (Westlands). (Doc.
33 No. 37.) The plaintiffs filed their First Amended Complaint (FAC) on February 24, 2020. (Doc.

1 No. 52.) On March 4, 2020, a set of priority CVP water contractors, the Sacramento River
2 Settlement Contractors (SRS Contractors), moved to intervene in this action. (Doc. 75.) On
3 March 13, 2020, the parties stipulated to allow permissive intervention of the SRS Contractors
4 and another set of CVP contractors, the Tehama-Colusa Canal Authority (TCCA), while
5 imposing certain conditions on the length of the written oppositions to be filed by those
6 intervenors to the pending motion for preliminary injunction. (Doc. No. 99.)

7 Now before the court is yet another motion to intervene, filed March 3, 2020, by a
8 consortium of SWP contractors, the State Water Contractors (SWC), and its member agencies,
9 which include the Metropolitan Water District of Southern California, Kern County Water
10 Agency, Central Coast Water Agency, and Solano County Water Agency. (Doc. No. 63.) The
11 SWC seek to intervene in this action as defendants as a matter of right pursuant to Federal Rule of
12 Civil Procedure 24(a)(2), or, alternatively, as a matter of permission pursuant to Rule 24(b). (*Id.*)
13 An applicant is entitled to intervene as a matter of right if: (1) the motion is timely; (2) the
14 applicant claims a “significantly protectable” interest relating to the property or transaction which
15 is the subject of the action; (3) the applicant is situated such that the disposition of the action may
16 as a practical matter impair or impede its ability to protect that interest; and (4) the applicant’s
17 interest is not adequately represented by the parties to the action. *Wilderness Soc. v. U.S. Forest*
18 *Serv.*, 630 F.3d 1173, 1177 (9th Cir. 2011) (*en banc*); *see also Allied Concrete and Supply Co. v.*
19 *Baker*, 904 F.3d 1053, 1067 (9th Cir. 2018). Permissive intervention “requires (1) an independent
20 ground for jurisdiction; (2) a timely motion; and (3) a common question of law and fact between
21 the movant’s claim or defense and the main action,” but “[w]here the proposed intervenor in a
22 federal-question case brings no new claims, the jurisdictional concern drops away.” *Freedom*
23 *from Religion Found., Inc. v. Geithner*, 644 F.3d 836, 843-44 (9th Cir. 2011) (citing *Beckman*
24 *Indus., Inc. v. Int’l Ins. Co.*, 966 F.2d 470, 473 (9th Cir. 1992)). “The decision to grant or deny
25 [permissive] intervention is discretionary, subject to considerations of equity and judicial
26 economy.” *Garza v. County of Los Angeles*, 918 F.2d 763, 777 (9th Cir. 1990); *see also Donnelly*
27 *v. Glickman*, 159 F.3d 405, 412 (9th Cir. 1998). When exercising this discretion, the court must
28 “consider whether the intervention will unduly delay or prejudice the adjudication of the original

1 parties' rights." Fed. R. Civ. P. 24(b)(3); *see also Donnelly*, 159 F.3d at 412.

2 Here, plaintiffs oppose the motion to intervene as of right, arguing that SWC's motion is
3 not timely because they waited more than three months after the filing of the initial complaint in
4 this action to move to intervene. (Doc. 106 at 4–5.) However, plaintiffs do not object to
5 permissive intervention by SWC so long as the court also imposes certain conditions on SWC's
6 participation, including the imposition of strict briefing page limitations at both the preliminary
7 injunction and later stages of this case, and the requirement that SWC avoid the submission of
8 duplicative briefing by requiring it to coordinate its briefing with the other defendants. (*Id.* at 8–
9.) Plaintiffs and SWC apparently attempted to reach a stipulation regarding permissive
10 intervention, but could not agree to terms regarding the conditions to be imposed. (*See generally*
11 Declaration of Jenna Mandell-Rice, Doc. No. 111-1.)

12 In the context of this highly complex case, and particularly in light of the time-sensitive
13 nature of the motion for preliminary injunction now pending before it, the court can and will
14 impose reasonable conditions upon briefing submitted by SWC in this action regardless of the
15 method of intervention. *See* Advisory Committee Notes on Rule 24, 28 U.S.C. App., p. 567
16 (“intervention of right . . . may be subject to appropriate conditions or restrictions responsive
17 among other things to the requirements of efficient conduct of the proceedings”), *cited with*
18 *approval in Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 383 (1987) (Brennan,
19 J., concurring in part). Accordingly, the court takes the path of least resistance in connection with
20 the present motion and will grant the unopposed motion for permissive intervention with
21 conditions. There can be no doubt, and plaintiffs do not dispute, that SWC plainly meets the
22 requirements for permissive intervention. Indeed, SWC has been permitted to intervene in
23 numerous previous disputes over biological opinions covering the Water Projects. *See, e.g.*,
24 *Natural Res. Defense Council v. Bernhardt*, 1:05-CV-1207-DAD-EPG (Doc. No. 213); *Pacific*
25 *Coast Federation of Fishermen's Ass'n v. Gutierrez*, 1:06-CV-00245-OWW-GSA (Doc. No.
26 45); *Golden Gate Salmon Ass'n v. Ross*, 1:17-cv-01172-LJO-EPG (Doc. No. 34).

27 The court will only address in this order the imposition of conditions on SWC's briefing
28 to be submitted in connection with the pending motion for preliminary injunction, leaving page

1 limits for the merits phase briefing to be determined at a later date (preferably by stipulation).¹ In
2 order to ensure that plaintiffs' pending motion is not mooted by the passage of time required to
3 digest and analyze the parties' arguments and evidentiary submissions, briefing must be
4 constrained, either by stipulation or by the court. The court notes that with respect to the most
5 recently added intervenor-defendants (SRS Contractors and TCCA), the parties have agreed to
6 limit opposition briefs to 20 pages combined (or 10 pages if briefing separately). *See* Doc. 102 at
7 4. This briefing is in addition to plaintiff's thirty-page opening brief, (Doc. No. 81), Federal
8 Defendants' thirty-page opposition, (Doc. No. 119), and an anticipated twenty-five-page filing by
9 the first set of intervenor-defendants (Westlands and the Authority). (*See* Docs. 100, 106 n. 1.)
10 The court believes that, for purposes of their opposition to the pending motion for a preliminary
11 injunction, SWC should be afforded a maximum of fifteen pages, exclusive of exhibits, slightly
12 more than each of other recent intervenors, in light of the fact that SWC is the only party to this
13 case that has a direct interest in the regulatory requirements applicable to the SWP. SWC is
14 further instructed to avoid the submission of duplicative briefing on issues covered by other
15 defendants or intervenor-defendants. All parties are warned that any duplicative briefing will be
16 disregarded by the court.

17 The court also recognizes that the existing deadline for defendant intervenors to file their
18 oppositions to the pending motion is March 31, 2020. In order to facilitate the process of
19 conforming its brief to this order, SWC shall have until noon on April 2, 2020 to file its
20 opposition. In the interest of fairness, plaintiffs may, at their election, informally petition the
21 court for appropriate relief from its existing reply deadline by emailing such a request to
22 dadorders@caed.uscourts.gov, or may instead elect to file a separate reply to the SWC opposition
23 on or before noon on April 12, 2020.

24 _____
25 ¹ The court understands that plaintiffs would prefer the court to impose general page limits at this
26 time on intervenors' future briefing in order to avoid additional litigation on page limits as this
27 case progresses. The court is sympathetic to this concern, but believes it cannot impose such
28 page limitations in a vacuum. Nonetheless, all parties are forewarned that if they cannot reach
agreement on how to reasonably constrain the length of their briefing addressing the merits of this
action, the court will have no choice but to do so. Prolix briefing is in no one's best interest, and
certainly not the court's, even in a case as complex as this one.

1 All parties are reminded that pursuant to Eastern District of California General Order 612,
2 “[a]ll of the court’s civil matters will be decided on the papers, or if the assigned Judge believes a
3 hearing is necessary, the hearing will be by telephone or videoconference.” The court will review
4 all of the papers as expeditiously as possible and will inform the parties whether it intends to set a
5 telephonic or video hearing on the pending motion and, if so, setting the date and time for that
6 hearing.

7 IT IS SO ORDERED.

8 Dated: March 29, 2020

Dale A. Drayd
9 UNITED STATES DISTRICT JUDGE

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